

1 and was rejected from evidence.)

2 JUDGE SIPPEL: Eighty-one.

3 MR. SEIVER: Eight-one and 82 can be
4 considered together, Your Honor, and I think these are
5 problematic for Gulf Power, and if I could put this in
6 context, if you recall, last October we were having a
7 discussion about make ready, and one of the things
8 that Gulf Power had represented, which we never
9 challenged, is that there has not been an instance
10 where make ready had been denied for any reason.
11 Obviously putting aside nonpayment, but Gulf Power had
12 not told any of the Complainants' and to our
13 understanding, we're not sure but we have not seen it
14 of them telling any prospective attacher, "No, you
15 can't attach," or that, "No, we won't do make ready or
16 a changeout."

17 And we attempted to come to some agreement
18 on a stipulation, and that's the first exhibit, is 81,
19 is the stipulation on make ready practices. This was
20 an issue for us that was a problem because of an
21 inability to come to an agreement, and it dropped by
22 the wayside. We thought it was relevant for our

1 efforts in putting our trial brief together and for
2 putting our proposed findings and conclusions that
3 there were issues about whether or not Gulf Power was
4 being reasonable or not, and I intended to use this
5 when we are cross examining Gulf Power witnesses.

6 And perhaps I should have kept it back,
7 but I wanted to have it come into evidence because I
8 believe that it will be established an authenticated
9 with the witnesses that Gulf Power presents as to the
10 items that were proposed in the stipulation being
11 true.

12 MR. LANGLEY: Well, Your Honor, we do
13 object to these, and I'll start with the easiest
14 reasons. First, they are statements between me and
15 Mr. Seiver regarding a stipulation that we could never
16 agree on. So it's almost like settlement negotiations
17 to some extent.

18 We had tried to reach a stipulation, and
19 we didn't. If we had reached a stipulation, we'd be
20 talking about a different issue, how to handle that
21 stipulation for the purposes of the evidentiary
22 record, but that's not what happened.

1 So to the extent we had offered up
2 something or they had offered up something in that
3 process, it has nothing to do with the factual issues
4 in this case. The same argument applies for both 81
5 and 82.

6 Also, these are hearsay. Neither Mr.
7 Seiver nor I are going to be on the stand, hopefully.

8 JUDGE SIPPEL: Don't worry about that.

9 MR. LANGLEY: So we don't think that these
10 come in.

11 JUDGE SIPPEL: Mr. Seiver.

12 MR. SEIVER: On Exhibit 82, Your Honor,
13 that, just to put it in perspective, that was when we
14 were discussing Your Honor's order of December '05
15 that we understood was going to be a compliance order
16 that would result in documents being produced with
17 respect to each of the poles that were identified by
18 the parties, the 50 for Gulf and the 50 for
19 Complainants, given the fact that when we were looking
20 for tens of thousands of poles in the files that were
21 being offered for review, a targeted number of poles
22 could be produced.

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1 And if I was misled, I guess that's my
2 fault, but as I read Your Honor's order, that was
3 supposed to be produced. When nothing was produced,
4 we came to Your Honor, and there were some statements
5 made which I think were relevant to purposes of having
6 a stipulation and an order, and then Your Honor
7 recalls we moved for our own order and Your Honor
8 characterized it as one sided, and I took that chance
9 when it was denied, but some of the statements that
10 were made about documents' unavailability or
11 impossible to find on a pole-by-pole basis is what I
12 wanted to have established on the record.

13 JUDGE SIPPEL: Well, I mean, that's just
14 too speculative. It's more relating to discovery than
15 it is to the substantive merits here. You know, if
16 you want to cite me for making mistakes on evidentiary
17 or discovery rulings, I guess you can cite that in
18 your brief to the Commission if it goes that far, but
19 I just can't see pursuing it now.

20 MR. SEIVER: I wasn't looking at it for
21 that reason at all, Your Honor. I mean, if any party
22 has a problem with any of the interlocutory rulings,

1 there's an appeal. You know, they'll be free to raise
2 that regardless of what orders or what statements have
3 been put into evidence.

4 My point was on the findability of the
5 documents on a pole-by-pole basis from Gulf's files.

6 JUDGE SIPPEL: Well, I'm not going to do
7 it. I mean, I'm going to reject that one on the basis
8 of relevance.

9 MR. SEIVER: Eighty-one and 82, Your
10 Honor, were together.

11 JUDGE SIPPEL: Yes, 81 and 82. I'm going
12 to make the formal ruling, but I'm going to reject
13 both of them.

14 Documents under Tabs 81 and 82 are
15 identified for the record at proposed exhibits,
16 Complainants' Exhibit 81 and 82, and for the reasons
17 stated these are rejected as evidence. Eighty-one and
18 82 are rejected.

19 (Whereupon, the documents
20 referred to were marked as
21 Complainants' Exhibit Nos. 81 and
22 82 for identification and were

1 rejected from evidence.)

2 JUDGE SIPPEL: That leaves 83.

3 MR. SEIVER: And 83, I understood there
4 was not an objection to from Gulf Power.

5 JUDGE SIPPEL: Is that correct?

6 MR. LANGLEY: That is correct.

7 JUDGE SIPPEL: The document in Tab 83 is
8 identified as proposed Exhibit 83, Complainants'
9 Exhibit 83. It is a supplemental filing regarding 50
10 pole identification, and it is received in evidence at
11 this time as Complainants' Exhibit 83.

12 (Whereupon, the document referred
13 to was marked as Complainants'
14 Exhibit No. 83 for identification
15 and was received in evidence.)

16 JUDGE SIPPEL: That is it in terms of
17 documents in the three volumes. Does that conclude
18 then your documentary submission, Mr. Seiver?

19 MR. SEIVER: I believe it does, Your
20 Honor. In fact, I'm not sure if we have anything
21 other than one other testimonial issue to trouble Your
22 Honor with today.

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1 JUDGE SIPPEL: All right. I think that I
2 am anticipating. Does this have to do with witness
3 subpoenas?

4 MR. SEIVER: It does, Your Honor.

5 JUDGE SIPPEL: Okay. Well, what is the
6 state of that and where do we go from here on that?
7 Let me hear what you have to say.

8 MR. SEIVER: Your Honor, when we did our
9 direct case and our direct testimony, we included
10 deposition excerpts from the opposing party, from
11 witnesses that will be testifying as well as
12 apparently witnesses that will not be testifying here
13 at the hearing.

14 And we also included some deposition
15 excerpts from the Complainants' witnesses which by
16 Your Honor's direction were made available for
17 deposition in Pensacola on two days I believe it was
18 in February.

19 We, in anticipation of their depositions
20 being designated or portions of the deposition being
21 designated by counsel for Gulf Power, we did
22 designations as well. However, we should not have

1 included them as direct testimony or direct evidence
2 of our case-in-chief, but really as cross
3 designations, anticipated cross designations to Gulf
4 Power's designation.

5 However, regardless of how we characterize
6 them, Gulf Power wants each of the four gentlemen that
7 appear at the deposition to come to Washington for the
8 hearing. I said, "You had your chance at the
9 deposition to ask them what you needed to ask them,
10 and it would be a burden, and I think it would unduly
11 delay the hearing if they had to travel here for a
12 purpose that I'm not sure meets the relevancy of the
13 claim of full capacity poles and/or lost opportunity
14 poles beyond anything they have already gotten in
15 deposition or in the documents.

16 JUDGE SIPPEL: These are witnesses --
17 well, let me ask Mr. Langley or Mr. Campbell.

18 MR. CAMPBELL: I'm actually going to
19 respond to that one, Your Honor.

20 JUDGE SIPPEL: Tell me who the witnesses
21 are, what it's about and --

22 MR. CAMPBELL: The sequence is important,

1 and I will address that. The witnesses are the
2 Complainants' representatives that appeared for
3 depositions. They are the parties to this proceeding.
4 One is Mr. Burgess, and that is Bruce Burgess. The
5 other one is Mark O'Ceallaigh, I believe is how you
6 pronounce it. That's O, apostrophe, C-e-a-l-l-a-i-g-
7 h. The other representative is Shayne, S-h-a-y-n-e,
8 Routh, R-o-u-t-h, and Jeff Smith, each representatives
9 of the Complainants.

10 The issue really was brought to a head in
11 a little different sequence than Mr. Seiver alluded
12 to, and that is they did submit their case-in-chief
13 with affirmative deposition designations, substantial
14 designations, from these four representative witnesses
15 of the parties to this proceeding.

16 We did take a discovery disposition. A
17 discovery deposition is a very different animal than
18 a trial deposition. Objections are handled
19 differently. Strategic decisions are handled
20 differently about how you want to question these
21 witnesses.

22 We attempted in the interim to reach an

1 agreement on authentication issues with respect to
2 certain documents, particularly we had the Osmose data
3 that we wanted to authenticate. We submitted
4 substantial testimony from two different witnesses
5 with written prefiled direct testimony and deposition
6 designations from a third Osmose witness to
7 authenticate that data set, and we called them after
8 we did that and said, "Is there a possibility that we
9 could stipulate to the authenticity of that data to
10 streamline the trial, to release two, potentially
11 three witnesses and not be burdened with that?"

12 They said, "Yes, if you will stipulate to
13 our pole measurements," pole measurements taken by in
14 large part these four representatives.

15 And we said, "Yes," of course knowing that
16 we have the right to cross examine each of those
17 witnesses, as we intended to do with respect to those
18 pole measurements, reasonably assuming, of course,
19 that the party representatives would be live at trial.

20 When it came time to do the notice of
21 intent to cross examine witnesses, we had a
22 conversation with Mr. Cook, myself personally with Mr.

1 Cook, and I said, "We of course intend to cross
2 examine the witnesses on whose behalf you have
3 designated substantial deposition testimony," that
4 being consistent with the FCC's rules that if you
5 designate a deposition, that you have to make that
6 party available for cross examination at trial.

7 And their response only at that point was,
8 "Okay. Then we'll withdraw it as our case-in-chief
9 and we'll just counter designate to yours because we
10 don't want to make those people available for cross
11 examination."

12 That is a form over substance tactic that
13 is an effort to avoid cross examination on documents
14 that they have asked to be admitted into evidence.

15 Now, I will note about those documents
16 their pole measurement data, that when we entered into
17 that stipulation which I set forth very carefully in
18 our notice of intent to file or to seek cross
19 examination that we reserve the right to raise other
20 objections to the admissibility of the evidence,
21 including relevance, and each party also retains the
22 right to make arguments concerning the weight to be

1 afforded to that evidence that is ultimately admitted.

2 We can't appropriately attack the weight
3 of their measurements until we have them on the stand
4 and are allowed to have a trial cross examination of
5 these witnesses who are proffering this data, and
6 again, that is a very different animal than a
7 discovery deposition.

8 They were not tendered as witnesses for
9 trial deposition. No notice was given to us that the
10 parties would not be present at trial to provide
11 authenticating testimony in support of their
12 positions, and so we think that this is a form over
13 substance tactic on their part. We think it
14 prejudices us, and we want to have cross examination
15 of these witnesses if they're going to have any
16 testimony in this case.

17 JUDGE SIPPEL: Well, how much cross were
18 you anticipating? These are witnesses -- go ahead.
19 I'm sorry.

20 MR. CAMPBELL: It will be limited, Your
21 Honor. I mean, we're going after a certain set of
22 data out of these witnesses. Cross has to be limited

1 to the scope of the direct, and so the direct is what
2 it is, and we will observe the Federal Rules on these
3 witnesses.

4 JUDGE SIPPEL: Is this written testimony
5 that's coming in or is this just stipulation?

6 MR. CAMPBELL: It's deposition testimony
7 that initially they identified in their case-in-chief,
8 and we said, "Okay. If that's going to be your
9 testimony, then we have a right to cross examine those
10 people."

11 And that's how we formulated our case, and
12 then after it was over and they realized, oh, no,
13 there is a rule that allows them to cross examine our
14 witnesses did they decide, well, we're going to double
15 back and we'll yank it out, and we'll call it cross
16 designations.

17 Now, I might also add that they made an
18 effort at that time to say, "Well, Mr. Campbell, you
19 did the same thing."

20 No, we didn't do the same thing. What we
21 did with Mr. David Tessieri was that we said since
22 we've stipulated to the Osmose data and Mr. McVearry

1 and Mr. Barker are no longer necessary to authenticate
2 the data, and to a large extent, if not entirely, Mr.
3 Tessieri's deposition was being offered to
4 authenticate the data, we're going to go back and
5 reevaluate that, guys, and if we can withdraw it,
6 we'll withdraw it from our case-in-chief, and if not,
7 if we need some, since you've designated substantial
8 portions of Mr. Tessieri's, we'll cross-designate and
9 put it in that way.

10 Cross examination of Mr. Tessieri was
11 never discussed, never sought to be avoided, and
12 indeed, if they want Mr. Tessieri here, he'll be here,
13 but that's not the issue.

14 So it's not the same thing, and I'm going
15 to hear that from them, and I just wanted to go ahead
16 and address that so I don't have to pop back up again.

17 JUDGE SIPPEL: All right. Who's going to
18 address this?

19 MR. SEIVER: I will, Your Honor. Mr. Cook
20 may have something to add to it.

21 My recollection is, and this is part of
22 our battle that we had regarding the supplemental

1 filing that Gulf did, is that it was intending to go
2 out and get its own measurements of all the poles that
3 Complainants identified, and I expected that, you
4 know, we didn't get any accounting records on our
5 poles, but the idea was that they needed, and I think
6 we assisted them in identifying to the extent that our
7 locations weren't good enough that they were going to
8 go out and do it themselves.

9 And I think they deserve the right to be
10 able to put that evidence in. So that's what I was
11 waiting for from them on those measurements, is that
12 the 50 poles that we've designated they've known about
13 for more than two months. If there is a problem with
14 what our measurements were, grilling one of our people
15 about it is not as relevant as putting on their own
16 evidence as, no, this is 19 feet, not 19.2 or whatever
17 it might be.

18 Plus, I believe they covered most of these
19 with Mr. Harrelson. A lot of them were discussed with
20 Mr. Harrelson, our expert who relied on these
21 particular measurements. So if there's a problem with
22 the measurements, he's available to answer any

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1 questions.

2 So it's kind of a surprise to me that they
3 want to have them for any reason, let alone that
4 reason, and any of the pages that we designated were
5 really just in anticipation. I don't understand why
6 we can't simply withdraw them if that's because of the
7 rule. If we had never designated them, then I guess
8 they wouldn't be asking.

9 MR. COOK: If I may supplement, Your
10 Honor.

11 JUDGE SIPPEL: I don't like this double
12 teaming, but go ahead.

13 MR. COOK: No, no, just to the extent that
14 it was referenced discussion here, you know, we
15 identified these folks deposition excerpts only, not
16 written testimony, you understand, but just excerpts
17 from their deposition for one chief purpose, and that
18 was because I was concerned that Gulf might challenge
19 the measurements made by these four individuals, that
20 the data and pole measurements that have now been
21 admitted into evidence this morning in Complainants'
22 exhibits -- or this afternoon -- Complainants'

1 Exhibits 15, 16, 17, and 18.

2 And we now have a stipulation from the
3 parties that there is, as Mr. Campbell says, he
4 reserve the right to challenge perhaps their
5 substance, but he admits that they're authentic, that
6 they were made, that they're there, and they're in
7 evidence.

8 And he certainly had the opportunity at
9 the deposition since they were produced to him before
10 the depositions to go over those measurements made by
11 our four guys, one from each company for each of the
12 ten, ten, ten, and 20 poles that you've seen or 50
13 poles that were divided up into.

14 So now that we have the stipulation, the
15 documents are in evidence. There is no need for us to
16 have these very brief deposition excerpts in our
17 affirmative case. We may not even need to re-tender
18 them as cross designation. We can see what Gulf does
19 with its designation.

20 But the point is they have had their
21 chance to ask our four guys about these measurements
22 over two days at depositions, and alluding to the

1 Federal Rules, there is a provision there saying that
2 the trier of fact and the decider will take into
3 account any undue burden on these gentlemen who are
4 the supervisors of day-to-day operations in the field.
5 They have no knowledge up to this point. Here we are
6 two weeks away from trial, that they're to be summoned
7 and drop what they're doing and come up here.

8 And I believe it would be an undue burden
9 and inappropriate to essentially give them a second
10 bite at the apple.

11 JUDGE SIPPEL: Yeah, Mr. Campbell, before
12 you continue, was the data available at the time of
13 the depositions that you're talking about cross
14 examining now?

15 MR. CAMPBELL: The data was made available
16 at the depositions, and we did question them in a
17 deposition strategy session about the data, how they
18 collected it, what went into it. We did not cross
19 examine them at length as you would at trial.

20 And what has happened is that they went
21 out in the field. They took the measurements. they
22 are then passing the measurements to their engineering

1 expert. The engineering expert is going to get on the
2 stand and formulate all kinds of hypothetical opinions
3 about what the data means.

4 What we saved for trial is the critical
5 analysis of practically in the real world what do the
6 Complainants to this proceeding, the parties to this
7 proceeding -- what is the import and impact of that
8 data to them, and we also have a right to attack the
9 way they measured their poles just like they're
10 attempting to attach the way we measure the Osmose
11 poles, and we have heard a great deal about that
12 today.

13 And so as far as, you know, the practical
14 point here, Your Honor, we think very strongly that
15 even the Court may want to engage in some inquiry of
16 the parties to this proceeding, the real world
17 practical people who are out there in the field
18 looking at these poles. The Court has a right to do
19 that.

20 And as far as the Federal Rules go, the
21 Federal Rules also have a strong preference for live
22 testimony and certainly live testimony of the parties

1 to the proceeding, and you know, this is something
2 that the testimony is in there. It's critically
3 relevant. I don't want to call it sandbagging, but
4 the way this developed deprived us of the right to
5 have trial cross examination of our adversaries.

6 JUDGE SIPPEL: Let me ask this question.
7 You're indicating in your notice of intent to cross
8 examine -- where does it say that about -- oh, counsel
9 has agreed to produce these witnesses without
10 subpoena, but you're going to require a subpoena for
11 these four witnesses; is that right?

12 MR. SEIVER: Well, yes, Your Honor. We
13 weren't going to agree to provide the four
14 individuals. We didn't think that they should be
15 forced to testify. So that's why.

16 JUDGE SIPPEL: Well, there's nothing to
17 preclude Gulf Power from requesting subpoenas for them
18 to come in as witnesses if they've got relevant
19 testimony, and they could be cross examined as hostile
20 witnesses.

21 MR. SEIVER: Well, I would move to quash
22 the subpoenas then on the basis of burden and

1 unnecessary attack. I was expecting to be able to
2 argue part of the issue being if it's the measurements
3 they made, I don't know what difference it makes if
4 you have Mr. Routh on the stand, for example, and he
5 has a pole where there's a measurement of eight
6 inches, and I guess Mr. Campbell is going to say,
7 well, when we had our Osmose people go out there it
8 was six inches.

9 So what? If he has his Osmose person that
10 will say it was six inches, then I don't know. If he
11 wants to attack it that way, that's fine. We were
12 agreeing to authenticity to save everybody the problem
13 of someone trying to say on every particular
14 measurement, "Yes, I went out there with a hot stick,
15 and yes, I did it as accurately as I could." That's
16 what they are.

17 And if Mr. Campbell's client was going to
18 go out and measure the poles that we did, just as our
19 expert went out and measured the poles that they
20 designated, that's fine, and we don't want Mr. -- I
21 mean, if Mr. Tessieri wants to come, we'll cross
22 examine him, but we didn't want the others because

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1 what's the point of us showing Mr. Harrelson's?

2 JUDGE SIPPEL: Wait a minute. What are
3 you relying on? For measurements are you relying on
4 what these four individuals did?

5 MR. SEIVER: Well, there is an exhibit
6 where the poles show pictures of poles and addresses,
7 and there were measurements that were made, and those
8 were all turned over to Gulf Power well in advance of
9 the deposition showing here are our 50 piles and here
10 are the measurements. And that's an exhibit, and that
11 was available to them to cross examine if they wanted
12 to or to send their own people out to make their own
13 measurements.

14 We're not trying to challenge their
15 authenticity of their measurements either. We had our
16 own expert go out and measure their poles that they
17 designated. I didn't think it was appropriate to then
18 take that and waste the Court's time arguing about a
19 six inch or an eight inch, you know, differential with
20 the witness that measured it. I don't know if the
21 Court would want to hear about credibility to make
22 that kind of a determination. There's an example.

1 There's a measurement, and it's there.

2 MR. CAMPBELL: I think we have gotten off
3 path here because I think there are a couple of errors
4 here that need to be corrected. Number one, we were
5 provided the pole measurement information taking four
6 depositions in two days on the morning of the first
7 deposition, and now I hear that we're expected to take
8 trial cross examination of those witnesses given that
9 environment. That's the first piece of
10 misinformation.

11 The second piece of misinformation, my
12 understanding based on having taken the deposition of
13 Mr. Harrelson, their expert, is that he did not take
14 any measurements. Perhaps one measurement of some
15 transformer platform. The measurements he relies on
16 are the measurements taken by the Complainants
17 themselves. Yet the effort is to shield them from
18 cross examination.

19 I will also point out that Your Honor hit
20 on the most practical point in all of this, and that
21 is had it been done differently, we would have exactly
22 subpoenaed these witnesses to appear as adverse

1 witnesses in our case-in-chief had anyone give us any
2 notice that the Complainants themselves were not going
3 to show up at the trial of this proceeding.

4 That's what you do, and that's our
5 intention now. If we can't reach agreement on this,
6 if they're not going to produce the witnesses, we have
7 subpoenas right here that we're going to hand to the
8 other side and get those witnesses here to stand
9 behind the measurements and the allegations they make
10 against our positions in this case.

11 MR. SEIVER: Your Honor, the burden of
12 proof is on Gulf Power. I don't know how many times
13 we've been through that, but more than enough. I
14 think Your Honor even said in one of the orders that
15 Complainants don't have to do anything. We don't have
16 to put on any evidence, ask any discovery, do anything
17 in this case. This is compelling us to put on
18 evidence.

19 I just don't understand it.

20 JUDGE SIPPEL: Well, wait. Let's keep
21 this thing in context. Am I to understand that for
22 purposes of your defense, you are relying upon these

1 four individuals and some measurements that they did?

2 MR. SEIVER: Not as a defense. We picked
3 examples of poles for our expert to give opinions
4 about as he sat here to explain what is a full or
5 unfull pole. As you see it develop, you'll see he
6 also has his opinions on the 50 poles that Gulf did,
7 and I'm fully expecting that they will have some
8 testimony about whether or not our poles are full or
9 not full.

10 JUDGE SIPPEL: That's Mr. Harrelson.

11 MR. SEIVER: Mr. Harrelson, yes.

12 JUDGE SIPPEL: All right. Now, Mr.
13 Harrelson has some measurements that he is considering
14 in formulating his opinion.

15 MR. SEIVER: That is correct, Your Honor.

16 JUDGE SIPPEL: Were those measurements
17 done by these four individuals?

18 MR. SEIVER: Some, yes, and some were done
19 by himself.

20 JUDGE SIPPEL: Well, can you give me a
21 percentage? Did he do ten percent and the others did
22 90 percent or did Harrelson do ten and 90 or